United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,723

IRENE A. AWKARD,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

848

Appeal from a Final Judgment of the United States District Court
for the District of Columbia

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QUESTIONS PRESENTED

The questions presented on appeal are:

1. Whether in a trial for assault with intent to kill a 3-1/2 year old child by hurtling him over a banister, it is fatal error for the Government to fail to produce the child in Court without explanation except the mother's testimony that the child is out of the jurisdiction and sick.

2. Whether defendant is entitled to instructions on the missing witness rule as to:

(a) A 3-1/2 year old child allegedly the victim of an assault with intent to kill, there being a total lack of testimony as to any cry or spoken word by the child, but testimony and argument that he was unable to speak because of injuries sustained as a result of the alleged assault;

(b) Two men admittedly present at an alleged assault with intent to kill and simple assault, who were guests of the complaining witness.

3. Whether questions addressed to character witnesses erroneously referring to a conviction of defendant are cured by explanation by the Court to the jury that the incident referred to was a forfeiture of collateral in a domestic quarrel.

INDEX

TABLE OF CASES

CONSTITUTIONAL AMENDMENTS, STATUTES, RULES

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* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

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Appeal from a Final Judgment of the United States District Court
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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. 1291, 1294(1).

Appeal is taken from a final judgment of the United States District Court for the District of Columbia entered May 27, 1964, convicting Appellant of assault with intent to kill and simple assault, in violation of 22 D.C.C. 501, 504 (Br. 4). Appeal was noted June 1, 1964.

STATEMENT OF CASE

Indictment charging Irene A. Awkard with assault with intent to kill Mark A. Francisco and with simple assault on Minnie Francisco was returned March 10, 1964. Trial by jury, April 8 to 10, 1964, resulted in a verdict of guilty on both counts, and conviction, entered May 27, 1964. Timely motion for Judgment of Acquittal N.O.V. were denied. Defendant was placed on three years probation.

On February 8, 1964, appellant and complainant, Minnie Francisco, had an altercation in appellant's home. Appellant was cut with a knife and complainant was bruised. Complainant testified that after appellant assaulted her, she stumbled down the steps, and as she turned at the foot of the steps, she saw appellant go to a room where 3-1/2 years old Mark A. Francisco was sleeping, and throw him over the banister (Tr. 16, 17). On cross-examination, complainant admitted she could not see in her room from the steps, and that Alice Washington, Leon Awkard, several children, and two guests of complainant, identified only as "George" and "Melvin," were all present. (Tr. 19-32). Objection was made by defense counsel and overruled by the Court to introduction of a photograph of Mark A. Francisco as Government Exhibit 1 in lieu of producing the child in Court on the ground it was not the best evidence of the corpus delicti and was improperly identified. Mrs. Francisco's testimony that Mark was in North Carolina and ill was the only explanation offered for his absence. (Tr. 9-14). Defendant's requested instructions on the subject were denied. (Tr. 183-7). Similar requested instructions as to "George" and "Melvin" were denied. (Tr. 187-192).

Appellant's testimony that complainant attacked her with a knife was corroborated by Leon Awkard (Tr. 110, 112-5, 70-72) and by testimony by Government witnesses that appellant was bleeding. (Tr. 53). Appellant explained that in trying to escape the knife she pushed the child out of her way as she fled to her room, but that it was not near the

banister (Tr. 116-120). Government witness Dr. Venkataramana testified that the child's injuries were consistent with accidental falling (Tr. 150).

Character witnesses for appellant were cross-examined as to a conviction of appellant for disorderly conduct and two arrests, to which objection was made (Tr. 93-96, 102-4). Inquiry disclosed there was no conviction, that all incidents referred to grew out of domestic quarrels, and that the alleged conviction was forfeiture of collateral at the precinct, paid by appellant's husband. Appellant was not afforded opportunity to explain (Tr. 138-143, 164-171, 328-330).

CONSTITUTIONAL AMENDMENT AND STATUTES

Constitution of the United States, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .

18 U.S. Code, F.R.Crim.P., Rule 26, "Evidence":

> In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

District of Columbia Code (1961 Ed.):

> Title 22, D.C.C. 22-501: Every person convicted of any assault with intent to kill . . . shall be sentenced to imprisonment for not more than fifteen years. (31 Stat. 1321, ch. 854, sec. 803).
>
> Title 22, D.C.C. 22-504: Whoever unlawfully assaults or threatens another in a menacing manner, shall be fined not more than five hundred dollars or be imprisoned not more than twelve months, or both. (Mar. 3, 1901, 31 Stat. 1322, ch. 854, sec. 806).

STATEMENT OF POINTS ON APPEAL

Appellant respectfully states as points on appeal:

1. The Honorable Court below erred in denying Defendant-Appellant's timely Motion for Judgment of Acquittal as to Count One of the Indictment on the ground that:

(a) The Government failed to prove the corpus delicti by the best evidence by failing to produce Mark Anthony Francisco, by overruling defendant's requested instruction on the missing witness rule as to Mark Anthony Francisco, and by failure to produce the birth certificate of Mark Anthony Francisco.

(b) In permitting throughout the trial frequently repeated prejudicial and unsupported references by counsel for the Government to an alleged "hurtling" of Mark Anthony Francisco.

(c) In sustaining Government's objection to testimony impeaching Mrs. Washington by showing bad character and malice toward defendant.

2. The Honorable Court erred in denying Defendant-Appellant's timely Motion for Judgment of Acquittal as to Count Two of the Indictment on the ground that:

(a) There was no credible evidence of an assault on Minnie Francisco by appellant, there being substantial evidence that the testimony of Minnie Francisco was perjured, and that it was she who had assaulted appellant with a knife and wounded her.

(b) In limiting impeachment of Minnie Francisco by showing her incarceration for slashing appellant with a knife.

(c) In denying defendant's request for the missing witness rule as to two witnesses, "George Doe" and "Melvin Doe," variously described in the testimony as Minnie Francisco's boy-friend, her brother, and the brother of her friend.

(d) In denying defendant's request for instruction that the jury might disregard the testimony of Minnie Francisco if they believed she was deliberately concealing the identity of absent witnesses "George" and "Melvin."

3. In admitting, over objection, questions by the Government addressed to character witnesses Kelly and Thomason contrary to established rules of evidence as to complaints by appellant's husband not resulting in conviction, and one precinct fine, and referred to by counsel for the Government as prior convictions.

ARGUMENT

I.

Failure of the Government to produce Mark A. Francisco at the trial is violation of Appellant's right to confrontation guaranteed by Amendment VI of the Constitution. His absence was not properly explained. The corpus delicti was not proven by competent evidence. A photograph and oral testimony in lieu of a birth certificate were not the best evidence.

With respect to Point I, Appellant desires the court to read the following pages of the reporter's transcript: Tr. 9-14, 21, 316-7, 149-150.

The Constitution of the United States, Amendment VI (Br. 3) defines due process in criminal cases as including the right to confrontation. Confrontation implies more than hearing of testimony, and includes appearance of the complainant in court. This right is also impliedly covered by Rule 26 of the Federal Rules of Criminal Procedure (Br. 3), and entails the duty of the Court to enter a Judgment of Acquittal under Rule 29 if the Government fails to prove its case by competent evidence. The child, Mark A. Francisco, was the corpus delicti of Count One of the indictment, so that failure to produce him in court amounted to insufficient evidence to establish the corpus delicti and to support a verdict. James C. Jones v. United States (1956), 97 U.S. App. D.C. 291, 231 F.2d 244. Government argument that the case

here under consideration is analogous to a murder trial (Tr. 11) is frivolous, since evidence of death in a murder case is proof of the corpus delicti. Without any such proof, argument was pressed upon the jury that absence of the child was the result of the assault, without evidence to substantiate the argument. The photograph, introduced over objection in lieu of production of the child, was identified only by Mrs. Francisco's testimony, and her testimony that the child was in North Carolina and ill was the only explanation of his absence. (Tr. 21).

The court should not have let the issue go to the jury to speculate on highly prejudicial assumptions (Tr. 13) without evidence adequate in law to prove the corpus delicti. Cooper v. United States, 94 U.S. App. D.C. 343, 218 F.2d 39; Frank v. U. S., 262 F.2d 695; Green v. United States, 259 F.2d 180; Jones v. United States, supra. In United States v. Weiss, 103 F.2d 348, cert. granted Weiss v. United States, 59 S. Ct. 1043, 307 U.S. 621, 83 L.Ed. 1500, reversed 60 S. Ct. 269, 308 U.S. 321, 84 L.Ed. 298, the Supreme Court held that questions asked defendant on cross-examination which assumed facts without sufficient basis in record were improper. In New York Life Insurance Co. v. Rankin, 162 F. 103, 89 C.C.A. 103, the Circuit Court of Appeals for Missouri held that in cross-examination it is not permissible to assume as true a damaging state of facts without any reason to believe that there is a foundation of truth for it. (Tr. 316-7). In the closing argument counsel for the Government assumed the absence of Mark Francisco from the courtroom was the result of the alleged injury, and, contrary to the testimony of its own witness Dr. Venkataramana, that the child was in the hospital only three days, from February 9th to the 12th (Tr. 149) and that the injuries were consistent with an accidental fall (Tr. 150), assumed in argument that there was no competent evidence except that the child had been thrown over the banister.

II.

Evidence that Minnie Francisco first assaulted appellant with a knife established innocence as to Count Two. Appellant was entitled to the missing witness rule as to "George" and "Melvin," friends of complainant, who could have testified as to both counts of the indictment.

With respect to Point II, appellant desires the Court to read the following pages of the reporter's transcript: Tr. 19-20, 29-32, 43-4, 52-3, 70-3, 75-6, 109-110, 115, 119, 129, 188-192.

Substantial evidence, including appellant's scars, showed Minnie Francisco first attacked appellant with a knife. While complainant denied the knife (she would have been guilty of a felony), she admitted appellant was bleeding as a result of her scratches (Tr. 16, 26-7), a fact corroborated by all witnesses.

The case in chief made no mention of two men, "George" variously described as Mrs. Francisco's fiance, her brother, and her girl friend's brother, and George's uncle "Melvin," although admittedly they witnessed and participated in the incidents. On cross-examination, Mrs. Francisco at first denied their presence (Tr. 19):

"Q. Now who else was present in the house at that time?
A. Alice Washington, Mr. Awkard.

"Q. And who else? A. At that time that was all, and the children.

"Q. Was someone by the name of "George" there? A. They came in while the fighting was going on.

"Q. Who is "they"? A. George.

"Q. Do you know his last name? A. No, I don't.

. . .

"Q. And who else was there? A. George's uncle.

"Q. George's uncle. What is his name? A. Melvin.

"Q. And were they coming to see you? A. Yes."

Later testimony developed that George and Melvin witnessed and took some part in both the fight between appellant and complainant and

the incidents following the child's fall. They were available to the Government as friends of the complainant. They were not available to the defense. The court should have granted appellant's requested instructions as to the missing witness rule and the rule as to false testimony. (Tr. 190-192) The missing witness rule is defined in Milton v. United States, 71 App. D.C. 394, 110 F.2d 556, and reaffirmed in Billeci v. United States, 87 U.S. App. D.C. 274, 184 F.2d 394, 24 A.L.R. 2d 881, is that if a witness peculiarly available to one side or the other in a criminal prosecution is not produced, the jury can infer that his testimony would be unfavorable to the party that failed to call the witness unless the absence is sufficiently accounted for or explained. It is submitted subpoenas issued to "George Doe" and "Melvin Doe" at a street corner and returned "not to be found" are unsatisfactory explanation. Furqueron v. United States, App. D.C. 1946, 158 F.2d 193.

The same inadequacy of explanation applies as to Mark A. Francisco. The contention that he was too young to testify is irrelevant. The court has upheld admissibility of statements of children of comparable age as part of the res gestae in Snowden v. United States, 2 App. D.C. 89; Wheeler v. United States (1954), 93 U.S. App. D.C. 159, 211 F.2d 19; Crawford v. United States (1952), 91 U.S. App. D.C. 234, 198 F.2d 976. In Brown v. United States (1945, D.C. Mun. App.), 40 A.2d 832, it was held that conviction for assault on a child of almost exactly the same age as Mark may be based on uncorroborated statement of the victim, a child too young to qualify as a witness, as part of the res gestae. Reversal in this court, Brown v. United States, 152 F.2d 138, was upon the ground that the statements were made several hours after the alleged assault, and therefore not within the exception to the hearsay rule. Jones v. United States, supra, holds similarly. I find no cases where the child's presence in court was not required.

III.

References to arrests and forfeiture of collateral as a conviction of appellant is fatal error.

With respect to Point III, appellant desires the Court to read the following pages of the reporter's transcript: Tr. 92-6, 102-4, 137-143, 164-171, 328-330.

The questions addressed to character witnesses Kelly and Thomason by counsel for the Government referred to two arrests and a "conviction" of disorderly conduct. These all grew out of domestic quarrels. The alleged conviction was a forfeiture of collateral, paid by the husband who had made the complaint. None of these complaints were admissible for impeachment purposes.

The questions addressed to the character witnesses were made upon an assumption of facts which could not be supported in the record. In Pittman v. United States, 42 F.2d 793, it was held that cross-examination of a character witness cannot assume facts and then ask an opinion thereon regarding general reputation as affected by matters assumed.

Cases in point include the New York Life Insurance Co. and Weiss cases, cited above, and Leroy Payton v. United States (1955), 96 U.S. App. D.C. 1, 222 F.2d 794, in which this court held that introduction of damaging collateral facts was prejudicial to the defendant's right to be tried solely on the evidence against him: Chebithes v. Price, 59 D.C. 212, 57 F.2d 1008; Sanford v. United States, 69 App. D.C. 44, 98 F.2d 325; United States v. Boyer, 150 F.2d 595, 80 U.S. App. D.C. 202; Clifton v. United States, 54 App. D.C. 104, 295 F. 925.

CONCLUSION

Wherefore, Appellant respectfully prays the Court to reverse the Judgment of the United States District Court on the basis of the errors set forth in this appeal.

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18723

IRENE A. AWKARD, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.
FRANK Q. NEBEKER,
BARBARA A. LINDEMANN,
HENRY H. JONES,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1. Where during an argument the appellant struck the adult complainant and went into a bedroom and removed the child victim from his bed and threw him over the second floor banister to the first floor below and two persons witnessed this event, did the government adduce sufficient evidence to support the jury's verdict of guilty of assault with intent to kill the minor victim and assault on the adult victim?

2. Did the Court commit error in admitting into evidence the photograph of the three year old victim which showed his size and identity less than two months before the crime?

3. Where the character witnesses for appellant had testified to her reputation in the community for peace, good order, and truthfulness and the Court allowed the witnesses to be questioned on cross-examination by the witnesses as to whether they had heard in their community of appellant's arrests for assault with a deadly weapon and conviction of disorderly conduct, assuming such alleged conviction was a forfeiture of collateral and counsel agreed to the court's instruction to that effect, did such instruction cure the error, if any?

4. Where the whereabouts of two witnesses was not known to the government, did the Court commit error by refusing to charge on the missing witness rule?

747-582—64

INDEX

TABLE OF CASES

OTHER REFERENCES

*Cases chiefly relied upon are marked by asterisks.

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v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was indicted on March 10, 1964, in a two-count indictment, charging assault upon Mark Francisco with intent to kill (22 D.C.C. § 501), and simple assault upon Minnie E. Francisco (22 D.C.C. § 504). On April 10, 1964, she was found guilty by a jury in the U.S. District Court before Judge Robinson. Imposition of sentence was suspended and she was placed on probation on May 22, 1964 for a period of three years. This appeal followed.

The case revolved around an argument and altercation between appellant and Minnie E. Francisco during which appellant threw Francisco's three year old son, Mark Francisco, over a banister on the second floor to the first floor below.

Minnie E. Francisco and her son lived as roomers at 2706 13th Street, Northwest. They rented from appellant, who also lived in the house (Tr. 7–8). On Februrary 8, 1964 about 8:15 p.m. while Mark was asleep in bed (Tr. 9), an argument

ensued between appellant and Minnie Francisco concerning the absence of a light in the hall and the failure of Mrs. Francisco to pay her rent (Tr. 15, 38). During the argument appellant slapped Mrs. Francisco and a fight between them commenced (Tr. 15–16, 38–39). They were separated by appellant's husband (Tr. 24–25, 39). Mrs. Francisco retreated to the first floor and remained standing at the bottom of the stairs (Tr. 29, 39). Appellant went to Mrs. Francisco's second floor room, removed the sleeping child from his bed, brought him to the banister and threw him to the floor below, where he landed on his head (Tr. 17, 28, 29, 40–42).

Before appellant entered the room, in the words of Mrs. Washington, another roomer, "* * * she said she wanted them all out of the house. And she said she would fix them, and went into the room * * *." (Tr. 40). Just as appellant was about to throw the boy down the stairs she stated, "I will kill all of you" (Tr. 30).

Mrs. Francisco (Tr 19–20, 24, 32) and Mrs. Washington (Tr. 43–44) stated "George" and "Melvin" (last names unknown) were present during the occurrence. No further information was elicited concerning the whereabouts or availability of the men.

STATUTES INVOLVED

Title 22, District of Columbia Code, Section 501, provides:

> Every person convicted of any assault with intent to kill or to commit rape, or to commit robbery, or mingling poison with food, drink, or medicine with intent to kill, or wilfully poisoning any well, spring, or cistern of water, shall be sentenced to imprisonment for not more than fifteen years.

Title 22, District of Columbia Code, Section 504, provides:

> Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than five hundred dollars or be imprisoned not more than twelve months, or both.

SUMMARY OF ARGUMENT

The testimony of two witnesses who were present during the commission of the assault with intent to kill the child victim and assault on the adult victim was sufficient to support the jury's verdict of guilty. In addition the medical witness testified that the nature of the injuries to the child victim was consistent with the government's version of the crime and inconsistent with the appellant's version.

Error was not committed in admitting the photographs of the three year old victim into evidence for the limited purpose of showing the size and identity of the victim. The Court was entitled to use its discretion in allowing the exhibit into evidence. Such discretion was not abused as no other use was made of the exhibit than for identification. The nature of the photograph was such that it could not mislead the jury.

Appellant having acquiesced in the Court's instruction regarding the character testimony she is not free to complain on appeal.

Appellant's contention that the refusal of the Court to charge on the "missing witness rule" is without merit. In order to invoke the rule, the witnesses must be peculiarly within the power of the government to produce. The whereabouts of the witnesses in question was unknown to the government, therefore the Court properly refused to instruct on any inference the jury might conclude from their absence.

ARGUMENT

I. The evidence adduced by the government was sufficient to support the jury's verdict of guilty of assault with intent to kill and assault (see Tr. 15, 16, 17, 21, 30, 38–39, 40–42, 66, 70–72, 146–148)

Appellant questions the sufficiency of the evidence, contending that the presence at trial of the three year old victim of the assault with intent to kill was necessary to prove the corpus delecti. Such contention is without merit. The fact of a

crime having been committed was established by the testimony of the mother of the victim (Tr. 17, 30) and Mrs. Washington (Tr. 40–42). The testimony of witnesses that they saw the appellant go to the bedroom of the victim, return to the hall, announce her intent to "* * * kill all of you," and throw the child over a second floor banister to the first floor below was sufficient to prove all the elements necessary to constitute the crime. *Hancey* v. *United States*, 108 F. 2d 835 (10th Cir. 1940).

Moreover, there was further evidence that the victim suffered head injuries, consisting of a blood clot and fractured frontal bone (Tr. 66). The medical witness testified that injury to the head and absence of other injuries was consistent with the hypothetical that the child had been thrown over a banister to the steps below (Tr. 146–148).

The presence of the child victim was unnecessary. Being of such tender years as to be incompetent, he could not have provided additional evidence. Sufficient evidence having been presented by the Government to sustain the verdict, appellant's contention that the child was a necessary witness does not make out a case of reversible error in the absence of a showing that the child's presence was necessary to appellant's defense.[2]

Appellant's claim that there was insufficient evidence to support her conviction of assault on Mrs. Francisco is without merit. Mrs. Francisco (Tr. 15–16) and Mrs. Washington (Tr. 38–39) testified that appellant struck the first blow, a slap to Mrs. Francisco's face during the argument in the hall. Appellant's husband (Tr. 70–72) and appellant (Tr. 110) stated that Mrs. Francisco was the aggressor in the altercation. A clear conflict existed in the evidence. It was the jury's province to resolve the conflict. The jury having acted, the verdict must stand. *Jamerson* v. *United States*, 66 F. 2d 569, 573 (7th Cir. 1933), *cert. denied*, 290 U.S. 706 (1934); *Hardeman* v. *United States*, 82 U.S. App. D.C. 194, 163 F. 2d 21 (1947).

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[1] The child's date of birth was June 25, 1960 (Tr. 21).

[2] *Morton* v. *United States*, 79 U.S. App. D.C. 329, 147 F. 2d 28, *cert. denied*, 324 U.S. 875 (1945).

II. The court did not commit error in admitting the photograph of the 3 year old victim (see Tr. 10–14, 14–15)

Government's Exhibit No. 1, a photograph of the victim taken a little over a month before the crime (Tr. 14–15), was admitted for the limited purpose of showing the identity and size of the victim (Tr. 10–14). No other use or reference to the exhibit was made. In view of the fact that the Exhibit showed the victim in a normal state of health and condition and was not used in any way but to show his size and identity, there was no abuse of discretion in receiving the photograph into evidence. *Vaughn* v. *National Tea Co.*, 328 F. 2d 128 (7th Cir. 1964). Neither the nature nor the content of the exhibit was such that it could have misled the jury to the prejudice of the appellant. *Georgia So. Ry.* v. *Perry*, 326 F. 2d 921, 923–924 (5th Cir. 1964).

III. The court did not commit error by allowing the character witnesses to be questioned as to whether in their community they had heard of appellant's arrests for assault with a deadly weapon and conviction for disorderly conduct (see Tr. 164, 168–169, 330)

Appellant contends that the asking of questions of her character witnesses regarding two arrests for assault with a deadly weapon and a conviction of disorderly conduct was reversible error. Assuming *arguendo* error in the allowing of such questions, appellant has failed to preserve the points for appellate review.

Appellant requested of the court that the question regarding conviction of disorderly conduct be clarified by an instruction stating that it was a forfeiture (Tr. 164). The court agreed to give such charge and counsel dropped the matter at that juncture (Tr. 168–169). The court instructed the jury that the limited purpose for which the questions had been permitted was to test the knowledge and information and to test the standards of character evidence which these witnesses may have given. The court further charged the jury that the alleged conviction of defendant of disorderly conduct grew out of

a charge by the husband and that the charge terminated in a forfeiture of collateral by the appellant (Tr. 330).

Appellant cannot be heard to complain on appeal of alleged errors which she has cooperated in making in the trial court. *Lake City Nettleton and Bay Road Imp. Dist. No. 1* v. *Luehrman,* 113 F. 2d 458, 468–469. Having induced the court to take the path it followed, she must now abide by it. *Pokraka* v. *Lummus,* 230 Ind. 523, 104 N.E. 2d 669 (1952).

Furthermore, any harm that the testimony might have caused was rectified by the court's instruction limiting the use of the information. *Dolan* v. *United States,* 218 F. 2d 454, 459–460 (8th Cir.), *cert. denied,* 349 U.S. 923 (1955). *Burk* v. *United States,* 134 F. 2d 879, 882–883 (5th Cir. 1943); *Hilliard* v. *United States,* 121 F. 2d 992 (4th Cir.), *cert. denied,* 314 U.S. 627 (1941).

Moreover, the allowance of the questions was not erroneous either as to form or content and was such that they might properly test the credibility and knowledge of the character witnesses. *Stewart* v. *United States,* 70 App. D.C. 101, 104 F. 2d 234 (1939). See Generally 3 Wigmore, *supra,* § 988.

IV. The court did not commit error by refusing to give a missing witness instruction (see Tr. 32, 43, 189–192)

Appellant's contention that the court should have charged the jury on the missing witness rule as to "George" and "Melvin" is totally without merit. The testimony of the complainant Francisco (Tr. 32) and Mrs. Washington (Tr. 43) and the representations of counsel for the government show (Tr. 189–192) that the witnesses were not available to the government. Accordingly, the missing witness rule was not improperly refused as the witnesses were not peculiarly within the power of the government to produce. *Milton* v. *United States,* 71 App. D.C. 394, 110 F. 2d 556 (1940).

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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